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accessory service of collection and delivery of freight by horse power has been long exercised in England by the railroads and is in that country and on the Continent a recognised branch of railway service; that the railroads in this country could not lose this right by mere non user; that so long as they serve the general public impartially they have by their charters the exclusive right to the control and management of freight while in transportation over their rails, and that so long as they grant to the express companies the same rights as they grant to the individual shipper, they cannot, without a violation of their franchises be compelled to allow the agents of such companies the right to enter their cars and depots and take charge of and control the freight while in transmission; that the privileges heretofore enjoyed by the express companies arose from special contracts and can have no legal existence after such contracts have been determined. The argument on the part of the express companies is that the growth of the ex-

press business has been largely due to its encouragement by the railroads, and their refusal to collect or deliver goods except at their stations; that they have suffered the business to reach such proportions that it cannot now be carried on without the allowance of "express facilities" over their roads; that they have no authority to carry on an express business themselves, or if they have authority such business is accessory to and not part of their ordinary business as carriers by rail, and that for a railroad to carry on the express business itself and deny to the express companies "express facilities" is to so manage its road as to give to itself a preference or advantage in the conduct of an accessory business, a preference which, by a long train of decisions in England, has been held illegal.

Owing to the magnitude of the interests involved the contest may be long continued, and it is not improbable that it may give rise to future federal and state legislation.

FRANK P. PRICHARD.

Supreme Court of the United States.

ROBERT MITCHELL v. A. M. OVERMAN, ADM. OF STUTZMAN.

Where delay in entering a judgment arises from the act of the court, on account of its convenience, or the press of business, or the difficulty of the question involved, or any other cause not attributable to the laches of the parties but within the control of the court, the judgment may be entered retrospectively as of a time when it should or might have been entered.

It is the duty of a court to enter its judgment *nunc pro tunc* when justice to the parties can only be done in that way.

In error to the Circuit Court of the United States for the Southern District of Ohio.

In July 1866, Stutzman commenced an action against Robert Mitchell and others, in the District Court for the county of Webster, a court of general jurisdiction, in the state of Iowa. Two of the defendants, although duly served with process, failed to appear,

and against them, a decree *pro confesso* was entered by the state court, at its October Term 1868. As to all the other parties, the plaintiff and the defendants being present in person, or by counsel, the cause (as stated in the record) "was submitted upon the pleadings and proofs on file; and, after argument of counsel, the cause was then finally submitted, and taken under advisement by the court, the decree herein to be rendered as of the term of said trial and submission." Thereafter, at the October Term 1870, Mitchell "asked leave to amend his answer, which was granted, at the May Term 1871, upon terms." Subsequently, at the October Term 1872, that "amendment was stricken from the files for non-compliance with such terms;" and, thereupon, the court, at the last named term, to wit, on November 10th 1872, rendered a decree in favor of Stutzman against Mitchell for the sum of \$3396.58, with interest thereon at the rate of six per cent. per annum, from October 16th 1868, and for the costs. It was further ordered that the decree be "entered now [then], as of the 16th day of October 1868, the last day of the October Term of this court 1868, and shall take effect as of that date."

While the case was held under advisement, to wit, in November 1869, Stutzman, the sole plaintiff, died intestate. No suggestion, or notice of his death, was ever made of record, nor was the suit revived in the name of his personal representative, to whom, under the laws of Iowa, the right of action survived. Indeed, administration upon his estate was not had until November 26th 1872.

At the time the decree was rendered, neither Mitchell nor his attorney had any knowledge of Stutzman's death, but that fact was known to Stutzman's attorney of record, who drafted and procured the entry of the decree. It was, however, found by the court below, to which the cause was submitted upon a written stipulation, waiving a jury, that there was no fraud in obtaining the decree.

Upon the decree of the state court, Overman, administrator of Stutzman, on the 15th September 1873, commenced an action against Mitchell in the Circuit Court of the United States for the Southern District of Ohio. The defence was placed upon the ground that Stutzman was dead when, on the 10th of November 1872, the decree in the state court was, in fact, entered; and, for that reason, the decree, it was claimed, was absolutely void. The defence was held insufficient and judgment was rendered against Mitchell for the full amount of the Iowa decree. It was assigned

for error that the facts found do not authorize the judgment in the Circuit Court.

The opinion of the court was delivered by

HARLAN, J.—The common law was in force, in Iowa, during the whole period from the commencement to the conclusion of the suit in the state court, except as modified by sections 3469, 3470, 3472, 3473, 3477 and 3478 of the Iowa code of 1860, and by the Act of April 8th 1862. The latter act—of which, as well as of the state code, we must take judicial notice—substitutes, for one of the sections of the code, the following provision: “Actions, either *ex contractu* or *ex delicto*, do not abate by the death, marriage, or other disability of either party, nor by the transfer of any interest therein, if, from the legal nature of the case, the cause of action can survive or continue. In such cases, the court may, on motion, allow the action to be continued by or against his legal representative or successor in interest; but in case of the death of the defendant, a notice shall be served upon his representative under the direction of the court:” Laws of Iowa 1862, p. 229. These statutory provisions prescribe the manner in which actions may be revived, and the time within which such revivor must take place. But it is clear that they do not provide for a case like the one before us. The question here is, whether the state court was wholly without jurisdiction to enter the decree against Mitchell as of, or make it take effect from, the last day of the term at which the cause, during the lifetime of Stutzman, was finally submitted for determination. We are not informed by any decision of the Supreme Court of Iowa, to which our attention has been called, that this precise question has been passed upon in that tribunal. The cases, cited from that court, do not, in our opinion, meet the question, in the exact form in which it is here presented. Its disposition must, therefore, depend upon the rules of practice which obtain in courts of justice, in virtue of the inherent power they possess.

The adjudged cases are very numerous in which have been considered the circumstances under which courts may properly enter a judgment or decree as of a date anterior to that on which it is, in fact, rendered. We deem it unnecessary to present an analysis of the authorities, but content ourselves with saying that the rule established by the general concurrence of the American and

English courts is, that where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business, or the intricacy of the questions involved, or for any other cause, not attributable to the laches of the parties, but within control of the court, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim *actus curiæ neminem gravabit*—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice—it is the duty of the court to see that the parties did not suffer by the delay. Whether a *nunc pro tunc* order should be made depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the cause may require. These principles control the present case. Stutzman was alive when the cause was argued and submitted for decree. He was entitled, at that time, or at the term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the act of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

We attach no consequence to the fact that, while the cause was under advisement as to a final decree, Mitchell asked and obtained leave to amend his answer. The leave was granted upon terms, but as the terms were not complied with, the amendment was stricken from the files. The question must, therefore, be determined as if no amendment of the pleadings had been attempted.

It is scarcely necessary that we should extend this opinion by any comments upon the numerous cases cited in the printed argument of appellant's counsel. Many of them are cases where, although the death occurred after the submission of the cause or after verdict, the judgment was, in fact, entered as of a time subsequent to the death. Such cases manifestly have no bearing here, where the decree in the state court was entered as of a time when the party was alive, and to take effect from the date when the decree would have been entered, but for the act of the court, induced by causes beyond the control of the parties.

It seems to us to be entirely clear that the state court had the power, upon well-settled rules of practice, both in courts of law

and of equity, to enter the decree as of the term when, in the lifetime of Stutzman, the cause, after argument, was finally submitted for decision.

The decree is affirmed.

Nunc pro tunc judgments and decrees are granted, whenever injustice would otherwise result to the parties or any one of them, either through the mistake or delay of the court, or in certain special cases, through the happening of a contingency not anticipated, and which, by a mere technicality of law, is calculated to do injury to the substantial rights of the parties. As a general rule, the courts will order the entry of judgment *nunc pro tunc*, only where the delay is occasioned by the act of the court: *Tuomy v. Dunn*, 77 N. Y. 516; *Lawrence v. Hodgson*, 1 You. & Jcr. 368; *Ryghtmyre v. Durham*, 12 Wend. 245; *Crawford v. Wilson*, 4 Barb. 504; *Griswold v. Hill*, 1 Paine C. C. 484; *Cumber v. Warne*, 1 Str. 426; *Astley v. Reynolds*, 2 Id. 916; *Davies v. Davies*, 9 Ves. 461; *Belsham v. Percival*, 2 Cooper's Rep. of Cases in time of Lord COLTENHAM 431; *Green v. Cobden*, 4 Scott's Cases 486; *Blaisdell v. Harris*, 52 N. H. 191; 2 Daniell's Ch. Pr., pp. 1017-1018; Freeman on Judgments, sect. 57; Tidd's Pr. 952. And they will not so enter a judgment, where the delay occurred through the stipulation of the parties: *Ogden v. Lee*, 3 How. Pr. 153; *Diefendorf v. House*, 9 Id. 243; *Hess v. Cole*, 3 Zab. 117; *Yonge v. Broxson*, 23 Ala. 684. It may be further stated, that leave to enter *nunc pro tunc* will be given, only when the court is satisfied that there was good reason for the delay, and that the rights of parties will not thereby be affected: *Galpin v. Fishburne*, 3 McCord 22; *Ferguson v. Millaudon*, 12 La. Ann. 348; *Hess v. Cole*, 3 Zab. 117. A final judgment cannot properly be entered *nunc pro tunc*, without a special order of the court. It is not a matter, of course, to which a party is at al

events entitled, and which can be done by a ministerial officer of the court: *Erie Railroad Co. v. Ackerson*, 33 N. J. Law 33. Very often the order for the entry of the judgment is made in a previous order of the court, delaying the case for further consideration. In such cases, as soon as the judgment is rendered, it can be entered *nunc pro tunc*, without any further direction from the court. *Watson v. Jones*, 1 Kelly 300.

In order that the entry of a judgment *nunc pro tunc* may be binding upon all parties, due notice of the application therefor must be given to the parties to the cause. Otherwise the judgment has no force except from the date of entry: *Womack v. Sanford*, 37 Ala. 445. But where a confession of judgment is entered on the declaration on file, but not on the minutes of the court, in the absence of any proof of fraud in the entry, it may at a subsequent term be entered upon the minutes *nunc pro tunc*, without notice to the defendant: *Davis v. Barker*, 1 Kelly 559. This seems to be a mere formality, clerical though important in its nature, and such an entry without notice to other parties is not likely to be productive of any injury, since the confession of judgment by the defendant is an acknowledgment of the right of the plaintiff to a judgment. In this connection it may be stated that the service of notice need not appear on the record, even though the notice may be necessary: *Clemens v. Judson*, Minor 395.

The record must generally show the grounds upon which the judgment has been entered *nunc pro tunc*. But great latitude is permitted by the courts as to the details which are required to be stated. Thus it has been held that the

recital of the judgment, that sufficient matter to authorize it to be entered was disclosed to the court "by sufficient, competent and satisfactory evidence," would sustain the judgment, if parties had appeared on motion to perfect it, and did not show by a bill of exceptions, or in some other appropriate manner, that such recital was untrue: *Price v. Gillespie*, 28 Ala. 279; *Groner v. Smith*, 49 Mo. 318.

The *nunc pro tunc* doctrine applies both to law and equity. Where the case is one at law, and a verdict has been rendered in the trial court, there seems to be no difficulty in most cases in obtaining an entry of the judgment *nunc pro tunc*. The questions of fact have been decided, and the entry of the judgment has been delayed, to give the court time for the consideration of some question of law, or for some other good reason. In such a case the duty of the court is plain. As a general rule, the verdict must have been rendered and all the questions of fact settled, before the happening of the contingency, which makes the judgment *nunc pro tunc* necessary. But where the plaintiff died after a special verdict, taken subject to a reference, and before the award, the court held that there was a sufficient finding

fact before the death of the plaintiff to authorize an entry of judgment *nunc pro tunc*: *Heathcote v. Wing*, 11 Exch. 355. In *Currier v. Lowell*, 16 Pick. 170, a verdict was rendered in favor of the plaintiff, and a motion was made by the defendant for a new trial, causing a suspension of the entry of judgment. After the commencement of the ensuing term of the court, but while the motion was still pending, and no hearing had been had thereon, plaintiff died. Before the death of the plaintiff was suggested to the court, the motion for a new trial was heard and overruled. The court refused to dismiss the case, and ordered the judgment to be entered up as of a day, when plaintiff was living. So also

in *Springfield v. Worcester*, 2 Cush. 52, where the entry of judgment was postponed, until the court had passed upon some reserved questions of law. In *Dial v. Holter*, 6 Ohio (N. S.) 228, the cause of delay was a motion for a new trial and in arrest of judgment. The law upon this branch of the subject is very tersely stated in *Tidd's Practice* 952: "If either party after verdict, had died in vacation, judgment might have been entered that vacation, as of the preceding term; though it would not be so upon the Statute of Frauds in respect of purchasers, but from the signing. And if either party die after a special verdict, and pending the time taken for argument or advising thereon, or on a motion in arrest of judgment, or for a new trial, judgment may be entered at common law after his death, as of the term, in which the *postea* is returnable, or judgment would otherwise be given *nunc pro tunc*; that the delay arising from the act of the court, may not turn to the prejudice of the party." See *Gurney v. Parks*, 1 How. Pr. 140; *Irvine v. Hazleton*, 37 Penn. St. 465.

It is very often provided by the rules of practice that judgments certified to the clerk in vacation, should be entered as of the last day of the term, but this can only be done where trial has been had during term time: *Wicks v. Ludwig*, 9 Cal. 173; *Billings v. Berry*, 50 Me. 31. In all law cases, tried before a jury, the verdict must have been rendered at the time from which the judgment *nunc pro tunc* purports to act: *Gray v. Thomas*, 12 S. & M. 111.

Courts of equity have full power to order the entry of a decree *nunc pro tunc*, where the decree has been made at the proper time, and through mistake or omission has not been properly entered of record. Even though the original decree has been lost, and years have elapsed since it was pronounced, the court would order an entry to be made *nunc pro tunc* from an office copy: *Law-*

rence v. Richmond, 1 Jac. & W. 241; *Donne v. Lewis*, 11 Ves. 601. In *Jesson v. Brewer*, 1 Dick. 371, where all the pleadings, including the original decree, were lost, the court, twenty-one years thereafter, upon proper proof that such a decree had been rendered, permitted an office copy to be entered and enrolled *nunc pro tunc*. This rule is also applicable to law cases. In *Mays v. Hassell*, 4 Stew. & Port. 222, a judgment *nunc pro tunc* was entered three years after the rendition of the verdict. But to authorize a judgment to be entered in such cases *nunc pro tunc*, there must be some matter of record or memorandum of the court, as a foundation for the claim to such a judgment: *Andrews v. Branch Bank of Mobile*, 10 Ala. 375. In *Glass v. Glass*, 24 Ala. 468, and *Yonge v. Broxson*, 23 Ala. 684, the minute entries of the clerk were held to be sufficient to justify the entry of judgment *nunc pro tunc*. And in establishing the claim to such an entry, reference cannot be had to any evidence to show what the judgment should be, other than what is furnished by the record itself: *Draughan v. Tombeckbee Bank*, 1 Stew. 66. This of course does not conflict with the cases cited above, where the record has been lost or destroyed.

But the power of courts of equity to enter decrees *nunc pro tunc*, is not limited to cases where a decree has been pronounced, and the officers have failed to enter it as the judgment of the court. They have gone farther than that, and granted judgments or decrees *nunc pro tunc*, where no decree had been rendered, as was done in the principal case: *Bank of United States v. Weisiger*, 2 Pet. 481; *Perry v. Wilson*, 7 Mass. 393; *Campbell v. Mesier*, 4 Johns. Ch. 342; *Wood v. Keyes*, 6 Paige 479; *Vroom v. Ditmas*, 5 Id. 528, and other cases cited *supra*. And this power is extended to all cases of trial by the court without a jury, whether the cause of action arises in law or in equity: *Ehle v. Moyer*, 8 How. Pr. 244. In

Vroom v. Ditmas, Chancellor WALWORTH went so far as to hold that a decree *nunc pro tunc* could be granted where one of the parties died before argument.

In most of the cases cited, the death of one of the parties has been the cause of entering the decree or judgment *nunc pro tunc*: *Bank of United States v. Weisiger*, 2 Pet. 481; *Clay v. Smith*, 3 Id. 411; *Campbell v. Mesier*, 4 Johns. Ch. 342; *Perry v. Wilson*, 7 Mass. 393; *Wood v. Keyes*, 6 Paige 479; *Vroom v. Ditmas*, 5 Id. 528; *Currier v. Lowell*, 16 Pick. 170; *Gurney v. Parks*, 1 How. Pr. 140; *Moor v. Roberts*, 3 C. B. (N. S.) 830, and other cases cited *supra*. It may also be stated here, by way of parenthesis, that wherever, according to the rules of practice of any court, the suit does not abate upon the death of one of the parties after verdict, or in equity after trial, the court will not order the entry of judgment *nunc pro tunc*, the necessities of the case not requiring it: *Tuomy v. Dunn*, 77 N. Y. 516; *Copely v. Day*, 4 Taunt. 701; *Moore v. Westervelt*, 14 How. Pr. 279; *Fowler v. Burdett*, 20 Tex. 34; *Roberts v. White*, 39 S. C. R. (7 J. & S.) 272. In the case of *Tuomy v. Dunn*, reference is made to the New York Code, sects. 1210 and 763. This salutary power of the court, however, is not restricted to cases of the death of parties. Any cause of injury, made effective through the act of the court, will give the party suffering the right to a judgment *nunc pro tunc*. Thus in *Springfield v. Worcester*, 2 Cush. 52, while judgment was suspended to permit a hearing of reserved questions of law, the statute, upon which the action was brought, was repealed without a saving clause. Any judgment, entered subsequent to its repeal, even in cases already pending and submitted, would have been irregular and subject to reversal. The court therefore ordered the judgment to be entered as of a day previous to the repeal of the statute.

But while the courts have power in

certain cases to enter judgments and decrees *nunc pro tunc*, yet no such judgment or decree can be rendered, so as to give it a retroactive effect, and make valid what never had any foundation in law. The right to such a decree or judgment must be established by something above or beyond the decree or judgment. Where judgment is entered *nunc pro tunc* to cure a defective entry, (or where there has been a verdict rendered without any entry of judgment,) such entry relates back as between the parties to the record, and will cure any variance between the judgment as originally entered, and the execution issued thereon: *Jordan v. Petty*, 5 Fla. 326; *Hyde v. Curling*, 10 Mo. 359. So, also, where an order amending a defective entry of judgment is made after the commencement of an equitable action, the right to bring which is based upon the judgment (suit to set aside an assignment of the judgment-debtor), the court can enter such order *nunc pro tunc*, and thus legalize all prior proceedings in the second action: *Produce Bank v. Morton*, 67 N. Y. 199; *Hart v. Reynolds*, 3 Cow. 421; *Chichester v. Cande*, Id. 39; *MacKay v. Rhinelander*, 1 Johns. Cas. 410; *Hogan v. Hoyt*, 37 N. Y. 300; *Fawcett v. Vary*, 59 Id. 597; *Close v. Gillespey*, 3 Johns. R. 526; *Bradford v. Read*, 2 Sandf. Ch. 163. Likewise where a verdict has been rendered, and execution is issued thereon before the formal entry of the judgment, the court will order an entry of judgment *nunc pro tunc*: *Groner v. Smith*, 49 Mo. 318. In this case judgment was so entered to make good the sheriff's sale of real estate on execution. The court said: "Although formal entry had not been made, it was nevertheless a real judgment, on which the clerk might issue a special execution, without waiting for judgment to be entered *nunc pro tunc*. That being the case, the sheriff's sale and deed were supported by a real judgment, and the *nunc pro tunc* entry was only intended to

furnish proper evidence of this fact." But where in equity there has been no decree, and the supposed right can alone be supported by such a decree made at the time, when it should have been rendered, then the decree *nunc pro tunc* will be of no avail. Thus in *Gray v. Brignardello*, 1 Wall. 627, a conditional and interlocutory decree had been filed, ordering the sale of property upon a certain contingency, not necessary to be stated here, and a final decree was required to make the sale valid, and cover it with the sanction of the court. This the parties failed to obtain; the property was sold, and subsequently a final decree ordering the sale was entered *nunc pro tunc*. The question of the validity of the sale was submitted to the United States Supreme Court, and it was there held that a *nunc pro tunc* decree cannot cure defects of so vital a character. Judge DAVIS, in delivering the opinion of the court, says: "By no rule of law can a decree, which was clearly an afterthought, and made subsequent to the sale, bolster up the authority to make it. Purchasers at a judicial sale are protected when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court, which clearly authorizes the act to be done, that the shield of the law is thrown around them."

Furthermore, a decree or judgment entered *nunc pro tunc* will not be permitted to act retrospectively upon rights acquired previous to the entry, and to nullify them. The decree or judgment so entered can subserve the interests of parties only so far as it does not conflict with the rights of others. So far as third parties are concerned, the legal effect and consequences are the same, whether the amended judgment is formally entered *nunc pro tunc*, or is made at one term as a modification of a judgment rendered at a preceeding term taking effect only from the date of entry. *Small v. Doathitt*, 1 Kans. 335. In

Vroom v. Ditmas, *supra*, the court say : "The decree upon the appeal must therefore be entered in the name of Ditmas, as of a day previous to his death, and subsequent to the perfecting of the appeal. But it must be without prejudice to any right acquired by the respondent, under the settlement with the widow or administratrix in New Jersey, to resist the revival of the suit in the name of the personal representatives of the decedent or otherwise ; or to the rights of the defendants or any of them, to appeal from that decree within the usual time after it is actually entered, in the same manner as if the complain-

ant was living at the time of entering in the register's office, and should die." In this case there had been a release by the representative of the deceased, and the court, without passing upon the validity of the release, the cause not being in a situation to discuss the question, stated that the *nunc pro tunc* decree would be granted, subject to the release, if valid.

It is needless to state that such a decree would be vacated upon proof that it clashes with the rights of other parties.

C. G. TIEDEMAN.

St. Louis, Mo.

Supreme Court of Iowa.

HECHT v. DITTMAN.

A sheriff's deed, executed upon a foreclosure sale, does not pass crops on the land which are matured and ready for the harvest, although they may not have been actually severed. Such crops possess the character of personal chattels and are not to be regarded as a part of the realty.

BECK, J.—Two cases are presented together in this appeal. They involve the same facts and rules of law, and are between the same parties ; they are, therefore, properly submitted together upon the same abstract. There is no dispute as to the facts, which are as follows: The property replevied is barley cut and in shocks, and oats, being partly threshed and partly in bundles or sheaves, all upon the premises where it was grown. The defendant had rented the land of one Ehrpe, who had previously executed two mortgages thereon—one, the senior encumbrance, to the New England Loan Company, and the other to the plaintiff, Hecht. After defendant had rented the land, plaintiff foreclosed his mortgage, and on the seventh day of July 1879, the time for the redemption from the sale as prescribed by the statute having expired, a deed was executed by the sheriff. The other mortgage was foreclosed, and the land was sold to one not a party to this transaction, and the time of redemption under the statute expired August 15th 1879, when a sheriff's deed was made. The foreclosure and sale under this mortgage cut off all claim or title held by plaintiff as